Petition

No. 81-1130

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In the Supreme Court of the United States

OCTOBER TERM, 1981

DANIEL COMAY,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

No. 80-423

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QUESTIONS PRESENTED

1. Under principles set out in *In Re Winship*, 397 U.S. 358, and *Jackson* v. *Virginia*, 443 U.S. 307, was defendant deprived of due process of law due to a complete failure of proof of "chain of custody" of the alleged contraband, resulting in a total absence of proof as to the nature of the substance, an essential element of the offense?

2. Whether defendant was denied due process of law, per principles of *Leary* v. *United States*, 395 U.S. 6, *In Re Winship*, 397 U.S. 358, *Jackson* v. *Virginia*, 443 U.S. 307, and *Sandstrom* v. *Montana*, 442 U.S. 510, where the essential element of "possession" was deemed established by application of a presumption of constructive possession arising from proof of control of the premises, but other facts and circumstances—including access to the premises by others—negate such conclusion and raise a reasonable doubt of defendant's guilt.

3. Whether defendant was deprived of his constitutionally protected right to present relevant defense evidence, where his conviction rests on proof of constructive, rather than actual possession, and the court excluded evidence tending to demonstrate that someone else (defendant's former live-in lady friend) may have placed the substance where it was found.

Parties Involved*

Petitioner, Daniel Comay, was the defendant in the trial court, appellant in the Appellate Court of Illinois, First Judicial District, and petitioner in the Supreme Court of Illinois. Respondent, the People of the State of Illinois, was the prosecution (plaintiff) in the trial court, appellee in the Appellate Court, and respondent in the Supreme Court of Illinois.

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* Per Rule 21.1(b).

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2. The decision below undermines the due process standards relative to the State's burden to prove every element of the offense beyond a reasonable doubt, per *In Re Winship*, 397 U.S. 358 and *Jackson* v. *Virginia*, 443 U.S. 307, and with respect to the doctrine of *Sandstrom* v. *Montana*, 442 U.S. 510, invalidating any shift of the State's burden of proof. Here, on the facts, an unconstitutional presumption of constructive possession from the fact that the contraband was found in an apartment occupied by defendant was utilized to justify the finding of possession, in violation of principles set out in *Leary* v. *United States*, 395 U.S. 6. Certiorari should be allowed so that this Court may enforce upon the States the due process requirements expressed in such decisions 20

3. The decision below seriously erodes the federally protected constitutional right to present evidence relevant to the defense, approving exclusion of evidence supporting defendant's defense theory on the spurious basis that no formal offer of proof was made. Certiorari should be allowed to insure that the States do not apply their own procedural rules to thwart due process principles concerning proffered defense evidence 26

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In the Supreme Court of the United States

OCTOBER TERM, 1981

NO. _____

DANIEL COMAY,

Petitioner,

VS.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

No. 80-423

Petitioner, Donald Comay (hereafter, defendant) prays that a Writ of Certiorari be issued to the Appellate Court of Illinois, First Judicial District, to review its decision affirming his convictions.*

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* The Appellate Court's order also remanded for sentencing as to certain counts, an aspect of the cause not presently before this Court on this petition. See fn. 2, *infra*.

Judgment and Opinions Below

The (unpublished[1]) Order of the Appellate Court of Illinois, First Judicial District, No. 80-423, is set out as Appendix A, per Rule 21.1(k)(i) of this Court. The order of the Illinois Supreme Court denying petition for leave to appeal, No. 54960, is unpublished; a copy is appended as App. B.

Jurisdictional Statement

On March 17, 1981, the Appellate Court of Illinois, First Judicial District, entered its order affirming defendant's convictions.[2] (App. A) Defendant's timely petition for leave to appeal was denied by the Supreme Court of Illinois on October 19, 1981. (App. B) This petition to review the judgment of a state court of last resort in a criminal case is timely filed within 60 days thereafter. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) and Rule 20.1.

Constitutional Provisions and Statutes Involved[3]

The Sixth Amendment to the United States Constitution provides, in part:

> "In all criminal prosecutions the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ."

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[1] The Appellate Court's order is unpublished per Illinois Supreme Court Rule 23, Ill. Rev. Stat., chap. 110A, sec. 23.

[2] The Appellate Court's order affirmed the convictions and remanded the cause for sentencing upon certain counts in accordance with directions in the Order; the remand for sentencing is not at issue in this petition. (See App. A, p. 11.)

[3] There is no issue in this Petition as to the interpretation of any statute.

The Fourteenth Amendment to the United States Constitution provides, in part:

> "Section 1 . . . [N]or shall any State deprive any person . . . of liberty, . . . ' without due process of law; . . ."

STATEMENT OF THE CASE

Nature of the Case

Defendant was charged in Information No. 79-2239 (Tr. 339-44) with five counts of possession of various controlled substances. He waived jury trial, and the court found him guilty as charged, except not guilty on Count 2 (possession of cocaine with intent to distribute). (Tr. 270)

The court sentenced defendant to 10 years imprisonment, without specification of the count(s) to which the sentence applied. (Tr. 314-15)

On appeal, the Appellate Court of Illinois, First Judicial District, affirmed the convictions, remanding for sentencing as to Counts 3, 4 and 5. (App. A, p. 11) (The remand for sentencing is not involved in this Petition, which seeks review only of such portion of the Order affirming the convictions.)

The Supreme Court of Illinois denied petition for leave to appeal. (App. B)

STATEMENT OF FACTS

To the extent that the Appellate Court's Order (App. A) contains material to meet the requirements of Rule 21.1(g), such is here incorporated by reference to avoid unnecessary duplication. The specific facts pertaining to the Points which follow are:

Basic Facts of Prosecution's Case

On February 9, 1979, defendant, Daniel Comay, resided in Apartment 3411 at 505 North Lake Shore Drive, Chicago, Ill. He was employed as a commodities broker and engaged in the real estate business.

On February 9, 1979, at about 11:00 a.m., defendant was in bed sleeping in a bedroom. He was sick. Six police officers arrived with a search warrant. (Tr. 57) In a second bedroom were women's clothes and makeup. (Tr. 124) Officer Patton testified he did not know how many people lived in the apartment, (Tr. 125); that in the foyer at the entrance to the apartment he found a blue suitcase (Tr. 60) with two other suitcases next to it (Tr. 64); that within the closed blue suitcase were items alleged to be contraband. (Tr. 61)

Facts re "Chain of Custody"

On direct examination, Officer Patton testified that the blue suitcase (which allegedly contained contraband) was inventoried and taken to the crime laboratory. (Tr. 62) But on cross-examination, he said he thought it was destroyed, and, even maybe left in the defendant's apartment. (Tr. 136-37)

Of 5 officers, only Patton testified about the suitcase. He stated that he "found a blue suitcase in the foyer, as you entered the apartment," (Tr. 60); "there were two other

suitcases around it." (Tr. 64) Initially, Patton testified on direct that the suitcase was inventoried by himself and taken to the crime laboratory:

> "Q. Now, after—After the apartment was secured, what, if anything, did you do with that suitcase?
> A. It was taken to the Chicago Police Department Crime—Crime Laboratory, and the contents of the suitcase was inventoried, submitted for—
> Q. *Did you personally take it there?*
> A. *Yes, sir. I did.*
> Q. And what exactly did you do?
> A. I—" (Tr. 62) (The last question was never answered.) (Emphasis added.)

On cross-examination, Patton changed his testimony entirely, yet he could not explain where the suitcase was. Observe the following backtrack from his direct testimony:

> "Q. Do you have that suitcase in court with you this afternoon?
> A. No, sir. I do not.
> Q. All right. Do you know where the suitcase is?
> A. No, sir. I believe it was subsequently destroyed, I believe.
> Q. The suitcase was destroyed?
> A. I am not sure, sir. I don't know where the suitcase is.
>
> . . . .
>
> Q. *Now, did you, yourself, take the suitcase down to the Crime Lab?*
> A. *No, sir.* I believe the suitcase remained at the apartment. The contraband was removed from the suitcase.
> Q. Do you know who took all the contraband from the suitcase?
> A. I did, sir.
> Q. You took all the contraband out of the suitcase and you left the suitcase in the apartment?
> A. Yes, sir.

Q. Was there any reason why you did not, in fact, inventory or take the suitcase back to the station with you?

A. No, sir. There was no reason." (Tr. 136-37) (Emphasis added.)

* * *

The same Officer Patton, who first testified that he turned the blue suitcase over to the crime laboratory, (Tr. 62), also testified on cross-examination that he did not know where the suitcase was, and that (1) he believed it was destroyed (Tr. 136), but that (2) he then believed the suitcase remained in the apartment and the alleged contraband removed from the suitcase. (Tr. 137)

He could not identify the packages containing the alleged narcotics as the same packages which he turned in to the crime laboratory. After first stating that he took the suitcase to the police crime laboratory, ". . . and the contents of the suitcase was inventoried . . ." (Tr. 62), he then filled out a narcotics envelope and submitted the alleged contraband to the lab for expert analysis. (Tr. 63) He brought the evidence to court by signing it out from the Evidence and Recovered Property Section in the subbasement at 1121 South State Street, (police headquarters). (Tr. 64)

He then identified a plastic bag as People's Exhibit 1, used by the crime laboratory to seal contraband. He did not put the cover on the exhibit, and it was not sealed at the time the exhibit was shown to him in court. (Tr. 65)

Another plastic bag containing a white chalky substance was identified as Exhibit 4, which Officer Patton stated he first saw in the suitcase. When asked by the prosecution whether it was "the same bag or is that a similar bag" to that which he had seen on February 9, Patton answered it was a *similar bag*. (Tr. 70) Shown Exhibit 5a, Patton

testified it was a bag with white tablets in it and when asked whether he had ever seen the package before, he said, *"No, sir. I have not seen this package before."* (Tr. 71) He was able to read the word, "Worer 714" on one of the pills, there being 379 tablets contained in People's Exhibit 5a. Shown People's Exhibit 5a by the prosecutor, Patton testified again it contained white tablets with the imprint "Worer 714" on the pills. There were 347 tablets in all in Exhibit 5b.

> "Q. Do these tablets appear *similar* to the ones that you saw on February 9, 1979?
> "A. They do, sir." (Tr. 73) (Emphasis added.)

Shown Exhibit 5c, Patton was asked if he had seen that package before, to which he responded, "I've seen a *similar* package, sir." (Tr. 74) (Emphasis added.)

> "Q. [By the prosecutor] Do you know whether the white capsules that are in the Chicago Police Department inventory bags originally were in that bag?
> "A. *I don't know for a fact sir.* You know,—I know that, when I inventoried them, I inventoried the white tablets in a bag, *similar* to this bag here." (Tr. 74) (Emphasis added.)

Shown People's Exhibit 6a, the witness stated it was a manila envelope.

> "Q. (By the prosecutor.) Have you seen that envelope before; have you seen that particular envelope before?
> "A. *No, sir, I haven't.*" (Tr. 75) (Emphasis added.)

Exhibit 6, being one clear plastic bag containing small purple dots was taken out of 6a.

> "Q. (By the prosecutor.) Have you seen this bag on February—did you see that bag on February 9, 1979 or a bag similar to that?
> "A. The Witness: I saw a bag *similar* to this, sir." (Tr. 76) (Emphasis added).

Also, with respect to People's Exhibit 7b and 7c, plastic bags containing crushed green plant, the witness was asked whether he saw that plastic bag "or a similar bag" to which the police witness responded that he saw *similar* bags. (Tr. 77-78) And the same questions and the same answers with respect to People's Exhibits 8 and 9, that he saw *similar packages.* (Tr. 78-79)

The parties stipulated that if the Chicago crime lab chemist, Christine Provost, were to testify, she would state that on March 23, 1979, she received a sealed package under Inventory No. 617704, lab case No. 79-100113, from Jerry Pozin, another chemist. (Tr. 145) She opened the package on April 3, 1979, removed several plastic bags, one of which contained white powder and another of which contained green capsules, identified by Exhibit Q-1. The contents of both bags were negative for controlled substances. (Tr. 145)

She found white powder in another plastic bag, identified as Exhibit Q-2, and the package contained 68.66 grams of white powder containing cocaine. People's Exhibit 4 was the same plastic bag containing powder, which was marked as Exhibit Q-2, and analyzed on April 3, 1979.

From another of the plastic bags, she removed some white tablets marked "Rorer 714." The tablets marked "Rorer" which had an open "4" were identified as Exhibit Q-3. The tablets marked "Rorer 714" which had a closed "4" were identified as Exhibit Q-4. An analysis of a random sample of white tablets, Exhibit Q-3, showed that they contained Methaqualone. An analysis of a random sample of the white tablets identified as Q-4 showed that the white tablets contained Diazapam. (Tr. 147) She placed the Q-3 white tablets in a plastic bag, People's Exhibit 5b. The Q-4 white tablets were put in a plastic bag,

People's Exhibit 5a. (Tr. 147) The plastic bag which contained the white tablets marked "Rorer 714" and marked as Exhibit 5c, was the same plastic bag which contained the white tablets she previously marked as Exhibits Q-3 and Q-4 on April 3, 1979.

The three bags which contained plant material were identified as her Exhibit Q-5. One of the bags contained 524.3 grams, another 578.7 grams, and a third bag, 103.0 grams of Cannabis Sativa, commonly known as marijuana. (Tr. 148) The plastic bag containing the plant material, People's Exhibit 7a, b, and c, were the same plastic bags which contained the plant material which she marked as Q-5 on April 3, 1979. (Tr. 148)

It was further stipulated that Provost would testify that on April 3, 1979 all these exhibits were returned "to the above-described package" and placed in a locked area until April 19, 1979, when she removed the package from the locked area.

She then removed a plastic bag containing purple tablets which had been analyzed on April 3, 1979. This bag was marked as Q-6 on April 3, 1979. She counted 27 purple tablets and analyzed 23 of them and concluded the tablets contained Lysergic Acid Diethylamide, commonly known as LSD, with a total weight of 0.20 grams. The plastic bag which contained the purple tablets marked as People's Exhibit 6b, was the same plastic bag which contained purple tablets which she previously marked as Q-6. (Tr. 149)

She further would state that all the plastic bags were returned to the package under Inventory No. 617704, and the lab case, No. 79-100113-C. She signed and sealed the package and placed it in a box marked "incomplete analysis." (Tr. 149-50)

Facts re "Constructive Possession"

There were two bedrooms in the apartment. (Tr. 124-25) For some time until shortly before February 9, 1979, Kathy Bennett had been the defendant's girl friend, (Tr. 214), and still had her own key to defendant's apartment. (Tr. 216; 219) Her clothes were in the second bedroom of the apartment. (Tr. 124; 221) Also having keys to defendant's apartment were his father, Morris Comay; Edward Marshall, with whom defendant composed music, (Tr. 231); Arlene Benns, defendant's cleaning lady, (Tr. 193); and building personnel. (Tr. 57)

Defendant testified that in January of 1979 his relationship with Kathy Bennett deteriorated. That because of her causing him trouble,[4] he told her to get out of his life, (Tr. 218), and that she refused to return the apartment key to him. (Tr. 219)

Defendant's cleaning lady, Arlene Benns, cleaned the defendant's apartment every Thursday for two years. (Tr. 193) On February 8, 1979, she cleaned the apartment, except for the bedroom in which defendant was asleep; she did not see a blue suitcase anywhere. During the entire period of time that she had been cleaning the defendant's apartment, she had never seen any such blue suitcase. (Tr. 203)

Lynn Hostetler testified that from the evening of February 8 to the morning of February 9, 1979, she was with the defendant in his apartment, and when she left about 7:45 a.m. on February 9, she never saw any suitcases sitting in the foyer. (Tr. 175-77)

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[4] The court sustained the State's objections to defendant's attempt to show that she had previously made false accusations against defendant to the police. (Tr. 217-18) See Point 3, pp. 26-28, *infra*.

The defendant testified that he had never seen the suitcase described by the officer in his apartment and that such suitcase was not in his apartment on the morning of the 9th. (Tr. 230)

The alleged contraband was not visible as such, but was contained within a closed suitcase. (Tr. 61)

Facts re Exclusion of Relevant Defense Evidence

Defendant testified that in January of 1979, his relationship with Kathy Bennett, his former live-in lady friend, deteriorated, and that because of her causing him trouble, he told her to get out of his life. (Tr. 218) She refused to return the apartment key to him. (Tr. 219)

The trial court sustained the State's objections to defendant's attempts to introduce evidence that Ms. Bennett had previously made false accusations against defendant to the police, and that due to her jealousy of defendant's relationship with other females, she may have "planted" the alleged contraband in defendant's apartment. (Tr. 217-18)

The relevance of this proffered evidence is clear, when one considers that the finding of possession herein is based on constructive, rather than actual, possession, (Tr. 268-69; App. A, p. 7), and that there is extensive evidence that others had access to the premises, (see *Facts re "Constructive Possession,"* pp. 10-11, *supra*), and that the alleged contraband was not visible as such but was contained within a closed suitcase. (Tr. 61)

Raising the Federal Questions Below [per Rule 21.1(h)]

Re Chain of Custody

Defendant argued in the trial court that the evidence was wholly insufficient to connect the drugs tested to the defendant, in that there was a total failure to prove "chain

of custody." The court nonetheless found defendant guilty as charged.

On appeal, defendant argued in the Appellate Court that the evidence did not sustain the conviction because of the failure to prove chain of custody of the drugs. While stating that the point was waived for failure to object to the foundation for admission of the drugs, and because defendant had stipulated to the contents of the chemist's report, (App. A, pp. 9-10), the court proceeded to rule that, on the facts, an unbroken chain of custody was established. (App. A, p. 10)

On Petition for Leave to Appeal, defendant argued in the Supreme Court of Illinois that his convictions should be reversed for insufficiency of proof that the drugs in court were the same as those Officer Patton allegedly found in the missing suitcase. Leave to appeal was denied. (App. B)

Re Constructive Possession

Although defendant argued in the trial court that the evidence was insufficient to demonstrate that he was in "constructive possession" of the drugs—and there was no question but that there was no actual possession by defendant, so that the prosecution's case depended on constructive possession—the trial court found that defendant had constructively possessed the drugs. (Tr. 268-69)

On appeal, defendant argued that the trial court's use of an inference of possession based on defendant's control of the premises was improper, since other facts and circumstances (including access of others to the premises) counteracted this inference and raised a reasonable doubt of his guilt. The Appellate Court ruled the evidence was sufficient to establish this element (possession) of the offenses. (App. A, pp. 7-9)

On Petition for Leave to Appeal, defendant argued that the evidence was insufficient to establish constructive possession and that the inference used by the trial court was improper; leave to appeal was denied by the Supreme Court of Illinois. (App. B)

Re Exclusion of Relevant Defense Evidence

The trial court sustained the State's objections to defendant's attempt to introduce the evidence in question. (Tr. 179-82; 217-19)

On appeal, defendant argued that the trial court erroneously excluded relevant evidence corroborative of his theory of the defense. The Appellate Court determined that failure of the defense to make a formal offer of proof as such prevented it from deciding on anything other than speculation as to the relevance of the proposed evidence. (App. A, p. 10)

In his Petition for Leave to Appeal, defendant argued that exclusion of this evidence violated his federally protected constitutional right to present evidence on his own behalf, and that the Appellate Court improperly applied the formalistic requirements of "offer of proof" in a bench trial where there was no question as to what evidence was being tendered. The Supreme Court of Illinois denied leave to appeal. (App. B)

REASONS FOR GRANTING THE WRIT

There are three important questions arising in this criminal prosecution that warrant the grant of Certiorari. In differing ways, each question reflects a serious fault in the administration of the criminal justice system of the several States. These faults of constitutional dimension can and should be reviewed and corrected by this Court.

1. **The decision below seriously erodes the due process standards relative to the State's burden to prove every element of the offense beyond a reasonable doubt, In Re Winship, 397 U.S. 358, by finding that the nature of the substances had been established despite a complete failure of proof of "chain of custody." This Court should grant certiorari to clarify the appicability of the due process aspects of Jackson v. Virginia, 443 U.S. 307, to a State bench trial, and to speak to the evidentiary requirement of proof of a continuous "chain of custody" of alleged contraband as an essential ingredient of proof of the nature of the substance tested.**

Under the due process standard recently set out by this Court in *Jackson* v. *Virginia,* 443 U.S. 307, 61 L.Ed.2d 560 (1979), incorporating principles expressed in *In Re Winship,* 397 U.S. 358, 361-64, 25 L.Ed.2d 368, 373-75 (1970), a conviction cannot stand if, taking the evidence most favorably to the government, no reasonable jury could have found defendant guilty as to each element of the offense. *Id.* at 324, 61 L.Ed.2d at 576-77. The case at bar involves application of this standard to a bench trial.

Here, the prosecution failed to establish the "chain of custody" of the evidence which defendant has been found guilty of having possessed, to such extent that, based on

the evidence of record, no reasonable finder of fact could have found that the substances seized in defendant's apartment were in fact the same substances tested by the chemist and produced in the courtroom.

The facts relevant to this argument are set out at pp. 4-9, *supra*.

On these evidentiary facts, clearly no rational fact-finder could have found that the substances the chemist said she received for testing were the same substances allegedly possessed by defendant.

* * *

The prosecution's burden to prove a continuous chain of possession of alleged contraband is essential to its case.

While the specific topic—chain of custody—apparently has not been addressed by this Court, the various federal Courts of Appeals uniformly have determined that proof of a continuous chain of custody is essential, where the nature of substance in question is an element of the prosecution's case.

In *Novak* v. *District of Columbia*, 160 F.2d 588 (D.C. Cir. 1947), the reviewing court reversed defendant's conviction where,

> "the laboratory records and the chemist's testimony respecting the analysis were not properly admissible in evidence because the . . . [prosecution] failed sufficiently to identify the sample from which the analyses were made as being that sample taken from appellant . . . [N]o effort was made to hand to the police officer . . . the bottle the chemist had used to see if he could identify it as the bottle he had labeled and initialed. *There is missing a necessary link in the chain of identification.*" *Id.* at 588-89. (Emphasis added.)

Accord, Smith v. *United States*, 157 F.2d 705 (D.C. Cir. 1946), clarifying that where tangible evidence is inadmissible because insufficiently identified, there is a failure of

proof as to the issue to which such evidence pertained, requiring reversal. *Smith* reversed a robbery conviction for insufficient "chain of custody" evidence as to certain items allegedly stolen.

While most of the cases discussing this principle have affirmed upon finding that the particular facts satisfied the "chain of custody" requirement, a comparison of the facts of those cases with those of the case at bar is persuasive that the requirement has not been met here. See, *e.g.*, *United States* v. *Brown*, 482 F.2d 1226 (8 Cir. 1973);[5] *United States* v. *Williams*, 544 F.2d 1389, 1391 (8 Cir. 1976); *United States* v. *Santiago*, 534 F.2d 768 (7 Cir. 1976);[6] *accord*, *United States* v. *S. B. Penick & Co.*, 136 F.2d 413, 415 (2 Cir. 1943); *Gallego* v. *United States*, 276 F.2d 914, 917 (9 Cir. 1960); *Brewer* v. *United States*, 353 F.2d 260, 262 (8 Cir. 1965); *United States* v. *McKinney*, 631 F.2d 569 (8 Cir. 1980); *United States* v. *Jackson*, 482 F.2d 1264, 1266-67 (8 Cir. 1973).[7]

Although the Illinois reviewing courts acknowledge and purportedly follow this rule, reversing where the evidence fails to connect the material analyzed by the chemist with the substance allegedly seized from defendant—see, *e.g.*,

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[5] "The criteria governing admission of exhibits into evidence is that there must be a showing that the physical exhibit being offered is in substantially the same condition as when the crime was committed." *Id.* at 1228.

[6] "The purpose of the chain of custody rule is to insure that the substance offered into evidence is in substantially the same condition as when it was seized." *Id.* at 769.

[7] "The prevention of tampering with or misidentification of evidence is vital to the admissibility of that evidence at trial." *Id.* at 1266.

People v. *Maurice*, 31 Ill.2d 456, 202 N.E.2d 480 (1964);[8] *People* v. *Scott*, 22 Ill.App.3d 770, 317 N.E.2d 737 (1 Dist. 1974);[9] *People* v. *Judkins*, 28 Ill. 2d 417, 192 N.E.2d 848 (1963); *People* v. *Resketo*, 3 Ill.App.3d 633, 279 N.E.2d 432 (1 Dist. 1972)—the Appellate Court's manner of applying the rule in this case operates to deprive defendant of due process of law by finding that the trial court was correct in upholding proof of chain of custody here, on these facts.

* * *

The reviewing court has completely missed the point.

So what that "there is no question in the case at bar that the substances tested were actually drugs."? (App. A, p. 10) The gist of defendant's position is, not that the substances tested were not (or might not have been) actually drugs; rather, we maintain that the substances tested were not those allegedly taken from defendant's apartment. (See pp. 4-9, 14-15, *supra.*)

Here, the raid on defendant's apartment occurred on February 9, 1979, and the chemist received and tested certain substances on March 23, 1979. (App. A, p. 4) There is no evidence whatsoever as to the whereabouts of the packages to which Officer Patton testified during the intervening month-and-a-half, or even to "standard procedure" at the Crime Lab.

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[8] Reversing where "we have no link, either by identification or continuity of possession, between the heroin in evidence and the defendant." 202 N.E.2d at 481.

[9] Reversing for failure to establish a chain, stating that in a prosecution involving narcotics or dangerous drugs, "the evidence must show that the substance is that which the State purports it to be and that it is the same substance which was taken from the defendant's possession." 317 N.E.2d at 738.

The Appellate Court's sole solace to justify using such evidence to convict is the waiver "dodge." Because "defense counsel did not object to the foundation for admission of the narcotics at trial or raise the issue in his post-trial motion," the court deems the point waived. (App. A, pp. 9-10)

However, the issue was joined, for the prosecutor recognized that he had to meet the burden of proving chain of possession, specifically arguing that the evidence as to "chain" was sufficient. (Tr. 258-59) That the chemist's testimony was stipulated to merely means that the parties agreed that if the chemist testified, the testimony would be as stipulated. This courtesy as to the content of the chemist's testimony does not operate as a waiver of the requirement that the chain of possession be established. Likewise, defendant's failure to object to admission of the evidence does not constitute waiver of the State's obligation to establish that the substance tested was the same substance as was taken from the defendant's apartment.[10]

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[10] In *People* v. *Maurice, supra,* the prosecution contended that any discrepancy as to the chain of custody was remedied by a stipulation as to the chemist's testimony. The Illinois Supreme Court held it could not be assumed, from such stipulation, that the chain of custody had been established:

> "We need only look to the substantial numbers of narcotic cases on our docket in recent years to know that crime laboratory analysis of material suspected to contain narcotics is a frequent occurrence in which identification errors could occur, and that continuity of possession or positive identification is therefore necessary to qualify such material or the results of analyses for admission into evidence. *The duty of the State to prove defendant's guilt beyond a reasonable doubt cannot be assisted by judicial assumption that a stipulation mistakenly stated the facts through the inadvertence of the representative of the People.* Admission of the heroin into evidence without positive identification or continuity of possession was error." 202 N.E.2d at 481-82. (Emphasis added.)

From the facts as summarized at pp. 4-9, *supra,* it is irrational to find that Officer Patton and chemist Provost were testifying about the same substances. Patton could not identify the packages containing the alleged contraband as the same packages which he turned over to the crime laboratory.

Where, as here, possession of contraband is the gravamen of the offense, the prosecution's failure to establish a continuous chain of possession, or to show that the substance seized is the same as that in court, (identity of substance), is fatal to the case against the defendant.

Certiorari should be allowed so that this Court may speak to the evidentiary requirements—rooted in due process of law—concerning chain of custody of evidence.

On certiorari, this Court should also deem the standards of *Jackson* v. *Virginia, supra,* as to the due process requirements of sufficiency of the evidence in State criminal trials, applicable to bench trials.

• • •

For total failure to prove chain of custody, and because Officer Patton could not and did not identify the drugs in court as those he allegedly found in the missing suitcase supposedly found in defendant's apartment, defendant's convictions violate due process of law per *Jackson* v. *Virginia,* and should not be permitted to stand.

2. The decision below undermines the due process standards relative to the State's burden to prove every element of the offense beyond a reasonable doubt, per In Re Winship, 397 U.S. 358 and Jackson v. Virginia, 443 U.S. 307, and with respect to the doctrine of Sandstrom v. Montana, 442 U.S. 510, invalidating any shift of the State's burden of proof. Here, on the facts, an unconstitutional presumption of constructive possession from the fact that the contraband was found in an apartment occupied by defendant was utilized to justify the finding of possession, in violation of principles set out in Leary v. United States, 395 U.S. 6. Certiorari should be allowed so that this Court may enforce upon the States the due process requirements expressed in such decisions.

Jackson v. *Virginia*, 443 U.S. 307, 51 L.Ed.2d 560 (1979), holds that due process requires reversal of a State conviction if no reasonable jury could have found defendant guilty as to each element of the offense. *Id.* at 324, 61 L.Ed. 2d at 675-77, following *In Re Winship*, 397 U.S. 358, 361-64, 25 L.Ed.2d 368, 373-75 (1970).

Under *Sandstrom* v. *Montana*, 442 U.S. 510, 61 L.Ed.2d 39 (1979), dealing with an instruction permitting the jury to draw a presumption against a defendant as to an element of the offense, an instruction which could have the forbidden effect of shifting to the defendant the burden of proof on any element of the offense violates due process of law.

And in *Leary* v. *United States*, 395 U.S. 6, 23 L.Ed.2d 57 (1969), Your Honors held that a presumption is constitutionally invalid under due process if the fact proved bears no rational relationship to the fact presumed.

Applying these principles to defendant's bench trial upon the facts of record at bar, defendant's convictions offend

due process, because from the evidentiary facts (as set out at pp. 10-11, *supra*), no rational trier of fact could find, beyond a reasonable doubt, that defendant was in constructive possession of the alleged contraband. Only by applying a presumption of possession arising from the fact that the material was found in an apartment defendant occupied—which presumption is unconstitutional under the principles of *Sandstrom* (prohibiting shifting the burden of proof to defendant) and of *Leary* (invalidating presumptions which lack rationality)—could the evidence be said to prove defendant's guilt of constructive possession beyond a reasonable doubt.

And, per the principles of *Jackson,* upon those facts, defendant's convictions violate due process and should be reversed.

Having found that defendant had "no direct personal possession" (Tr. 268), the trial court erroneously concluded there was knowing constructive possession because the suitcase was found in his apartment and "we cannot avoid the complete control that defendant has over his apartment. He is the only one there." (Tr. 269). The court's ruling was erroneous because, although the existence of drugs "on the premises under control of defendant—in and of itself, gives rise to an inference of knowledge and possession by him," this inference is insufficient to convict where there are "other facts and circumstances which might leave in the mind of the court, where a jury has been waived, a reasonable doubt as to his guilt." *People* v. *Nettles,* 23 Ill.2d 306, 178 N.E.2d 361, 363 (1976). Federal decisional law as to the quantum and quality of proof required to establish constructive possession militates against the position taken by the State courts here. See, *e.g., Arellanes* v. *United States,* 302 F.2d 603, 606 (9

Cir. 1962); *United States* v. *Batimana*, 623 F.2d 1366, 1369 (9 Cir. 1980); *United States* v. *Thomas*, 453 F.2d 141, 143 (9 Cir. 1971); *United States* v. *Landry*, 257 F.2d 425 (7 Cir. 1957). *Accord*, see *People* v. *Connie*, 52 Ill.App.2d 221, 201 N.E.2d 641 (1 Dist. 1964); *People* v. *Wolski*, 27 Ill.App. 3d 526, 327 N.E.2d 308 (1 Dist. 1975).

Here, the other facts and circumstances raise a reasonable doubt as to defendant's guilt.

When police entered defendant's apartment pursuant to a warrant, they found him asleep in a back bedroom. (Tr. 57) Defendant's father, a friend, an ex-girlfriend, and a housekeeper (in addition to routine building maintenance personnel) all had keys to the apartment. (Tr. 218-19, 231) Consistent with defendant's theory that others had access to the apartment, negating that he possessed the contraband (allegedly) found in a closed blue suitcase which police allegedly found in the foyer of the apartment,[11] women's clothing and makeup were found in the second bedroom of the apartment. (Tr. 124)

Significantly, there is no fingerprint evidence to connect defendant with the (supposed) contents of the suitcase or even with the suitcase itself. (App. A, p. 3)

All the evidence against the defendant is insufficient to prove beyond a reasonable doubt that he possessed the contraband (allegedly) found in the blue suitcase. The court acknowledges that the conviction depends upon constructive, not actual possession. (App. A, p. 7) Yet, while accessibility of the apartment to numerous other persons

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[11] We say "allegdly" because of conflicting testimony *re* this matter. See pp. 4-6, *supra*.

is conceded—as is the fact that the contraband was in a closed suitcase not shown to have borne defendant's fingerprints—the court amazingly has concluded that there was sufficient credible evidence from which the trier of fact could find possession by defendant beyond a reasonable doubt. This conclusion flies in the face of the facts as measured by the relevant case law.

Officer Patton alone testified that the contraband was recovered from the blue suitcase found along with several other suitcases in the foyer of defendant's apartment. (App. A, pp. 1-3; see pp. 4-6, *supra*.) The Appellate Court was at a loss why defendant made so much of the apparent loss of the suitcase supposedly containing the drugs for possession of which defendant was convicted. (App. A, p. 9) After all, says the Court,

> "defendant . . . was not charged with possession of a blue suitcase; rather, he was charged with possession of narcotics. . . ." (App. A, p. 9)

Of course he was not charged with possession of a blue suitcase; but he *was* charged with and convicted of possession of contraband found, according to police, *in* the blue suitcase in defendant's apartment.

In this context, the court's concomitant dismay at our "falsus in uno, falsus in omnibus" argument—that is, that because the officer[12] directly contradicted himself as to what became of the suitcase, his testimony was not to be believed in other respects either—appears fatuous.

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[12] Officer Patton, of the six officers who participated in the raid, was the only officer to testify about the "suitcase"; thus his testimony stands uncorroborated.

Taking Officer Patton's highly suspect testimony[13] together with the accessibility of the apartment to others[14] and the fact that the contraband was concealed within the suitcase,[15] rather than perceptible from outside,[16] the total-

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[13] Officer Patton's testimonial "flip-flop" between taking the suitcase to the Chicago Police Department Crime Laboratory and inventorying it, (Tr. 62), and leaving it in the apartment. (Tr. 137), raises serious doubts [to say the least] as to the officer's credibility. (Compare direct at Tr. 60-64 with cross at Tr. 136-37. See pp. 4-6, *supra*.)

The situation here is comparable to that in *People* v. *Catavdella*, 31 Ill.2d 382, 202 N.E.2d 1 (1964), where the court reversed, stating the conflicting police testimony "can hardly be explained as a mere mistake." 202 N.E.2d at 4. See also *People* v. *Quintana*, 91 Ill.App.2d 95, 234 N.E.2d 406 (1 Dist. 1968).

[14] Accessibility of the premises to others precludes a finding of guilt beyond a reasonable doubt based on these facts. See *United States* v. *Landry*, 257 F.2d 425 (7 Cir. 1958); *United States* v. *Thomas*, 453 F.2d 141, 143 (9 Cir. 1971); *Arrelanes* v. *United States*, 302 F.2d 603, 606 (9 Cir. 1962); *United States* v. *Batimana*, 623 F.2d 1366, 1369 (9 Cir. 1980); *People* v. *Wolski*, 27 Ill.App.3d 526, 327 N.E.2d 308 (1 Dist. 1975); *People* v. *Ireland*, 38 Ill.App.3d 616, 348 N.E.2d 277, 280 (3 Dist. 1976); *People* v. *Ridley*, 59 Ill.App.3d 164, 376 N.E.2d 43 (1 Dist. 1978).

[15] Moreover, any inference of guilt which arguably could be drawn merely from defendant's presence in the apartment where the suitcase supposedly was found is negated by the police's failure properly to inventory and retain the suitcase allegedly containing the contraband. See *People* v. *Faulkner*, 82 Ill.App.2d 54, 226 N.E.2d 467 (1 Dist. 1967).

[16] See *People* v. *Binns*, 27 Ill.App.3d 978, 327 N.E.2d 369, 371 (1 Dist. 1975), reversing, although items containing contraband were found in defendant's apartment, where—as here—defendant was asleep when the police arrived, and "there is nothing in the record to indicate that the . . . [items containing contraband] were opened or their contents could otherwise be seen." (In *Binns*, the contraband was in envelopes.)

ity of the evidence is wholly insufficient to establish defendant's guilt beyond a reasonable doubt.

Upon the facts of record at bar, there is only innuendo and speculation of defendant's guilt, which is insufficient to overcome the presumption of innocence. Due process requires proof beyond a reasonable doubt. *In Re Winship,* 397 U.S. 358, 361-64, 25 L.Ed.2d 368, 373-75 (1970); *United States* v. *Thomas,* 453 F.2d 141, 143 (9 Cir. 1971); *United States* v. *Diggs,* 527 F.2d 509, 513 (8 Cir. 1975).[17]

* * *

Certiorari should be allowed so that this Court may speak to the constitutionally permissible extent of the inference or presumption which may be drawn against one accused of a possessory crime merely from his being found in the same apartment with unexposed contraband, where the premises, albeit his own, were accessible to others. Application of this presumption here, upon these facts, violates due process of law as measured by principles set out in *Leary, Sandstrom,* and *Jackson, supra.*

Accordingly, defendant's convictions should be reversed for insufficiency of the evidence to establish possession, an essential element of the offenses.

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[17] The government's proof may not be furnished by mere speculation or conjecture. In *United States* v. *Diggs,* 527 F.2d 509, 513 (8 Cir. 1975), the court, reversing, said:

> "While the facts proved by the government were certainly suspicious, a jury is not justified in convicting a defendant on the basis of mere suspicion, speculation or conjecture."

3. The decision below seriously erodes the federally protected constitutional right to present evidence relevant to the defense, approving exclusion of evidence supporting defendant's defense theory on the spurious basis that no formal offer of proof was made. Certiorari should be allowed to insure that the States do not apply their own procedural rules to thwart due process principles concerning proffered defense evidence.

The trial court sustained the State's objections to defendant's attempt to show that Kathy Bennett, defendant's former live-in lady friend, had previously made false accusations against him to the police. (Tr. 179-82; 217-18) Defendant sought to demonstrate that due to her jealousy concerning defendant's relationships with other females, Ms. Bennett, who already had made false accusations against him to the police, may have "planted" the evidence in his apartment. Defendant testified that in January of 1979, his relationship with Ms. Bennett had deteriorated; that he told her to get out of his life, and that she refused to return the apartment key. (Tr. 218-19) (See p. 11, *supra.*)

* * *

A defendant charged with a crime in the State courts has a federally protected constitutional right to present evidence on his own behalf. *Chambers* v. *Mississippi*, 410 U.S. 284, 35 L.Ed.2d 297 (1973); *Washington* v. *Texas*, 388 U.S. 14, 18 L.Ed.2d 1019 (1976); see *Holt* v. *Virginia*, 381 U.S. 131, 136, 14 L.Ed.2d 290, 293 (1965).

> "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers, supra,* at 302, 35 L.Ed.2d at 312.

It is clear—especially on the facts of this case—that evidence that someone else may have placed the contraband where it was found by the police is extremely rele-

vant. See *People* v. *Binns*, 27 Ill.App.3d 978, 327 N.E.2d 369, 371 (1 Dist. 1975); *People* v. *Ireland*, 38 Ill.App.3d 616, 348 N.E.2d 277, 280 (3 Dist. 1976).

In *United States* v. *Vole*, 435 F.2d 774 (7 Cir. 1970), the Court of Appeals recognized the validity of the defense that a defendant had been "framed," reversing where the trial court refused so to instruct as to defendant's theory of the case.

In this bench trial, it was clear beyond peradventure what the nature of the proposed evidence would be. In the face of the reviewing court's obvious grasp of the argument (that the ex-girfriend had "planted" the evidence), merely to state the supposed rule [*re* offer of proof] justifying exclusion is to reveal its inapplicability here. In a jury trial, the argument might have some merit; but here, before the trial court sitting without a jury, strict adherence to any such rigid requirement is nonsensical.

Moreover, contrary to the reviewing court's assertion that there was no offer of proof or explanation of the proposed testimony's relevance, a careful reading of the record demonstrates that sufficient allusion, at the very least, was made to the "plant" or "frame" defense so as to negate this.

* * *

Certiorari should be allowed so that this Court may enforce the due process requirement that an accused must be permitted to present relevant defense evidence, with special attention to the application of State procedural rules which unreasonably interfere with the exercise of such right. Particularly here, in this bench trial and in circumstances where there is no genuine controversy as to what evidence is being proffered, adherence to such formalistic requirements results in a defendant being deprived of a most basic constitutional right.

In view of the paucity of the evidence as to the chain of custody and as to defendant's possession, it cannot be said that the improper exclusion of the proffered defense evidence did not affect the trial judge's decision to find defendant guilty. Accordingly, even if this Court disagrees with the conclusions pressed in Points 1 and 2, *supra,* respecting the insufficiency of the evidence, defendant's convictions should be reversed for improper exclusion of relevant defense evidence in violation of defendant's constitutional right, and remanded with appropriate directions.

CONCLUSION

For any or all of the foregoing reasons, the Petition for Certiorari should be allowed. And, upon consideration of the merits, defendant's convictions should be reversed for insufficiency of the evidence (Points 1 and 2), or, alternatively, reversed and remanded with appropriate directions for improper exclusion of relevant defense evidence (Point 3).

Respectfully submitted,

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Attorneys for Petitioner

APPENDIX

APPENDIX A

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

80-423

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

vs.

DANIEL COMAY,
Defendant-Appellant.

Appeal from the Circuit Court of Cook County.
Honorable Robert J. Collins, Judge Presiding.

ORDER DISPOSING OF APPEAL UNDER SUPREME COURT RULE 23

Defendant Daniel Comay was arrested on February 9, 1979, in his apartment in Chicago and charged with five counts of possession of an unlawful substance. Following a bench trial, he was found guilty and sentenced to 10 years' imprisonment. On appeal, he raises essentially four contentions: whether constructive possession of the narcotics was proven beyond a reasonable doubt; whether a proper chain of evidence of the seized drugs was established at trial; whether the trial court improperly excluded hearsay testimony attributed to the defendant's former girl friend; and whether defendant's sentence was illegal and excessive.

Chicago police officer Paris Patton testified that on February 9, 1979, he was assigned to the Vice Control Division,

narcotics section. Pursuant to a search warrant, Patton, accompanied by other police officers, went to defendant's residence at 11:30 a.m. that morning. Patton knocked at the door and, when there was no answer, waited approximately 1½ hours until a maintenance man appeared who could let him in the apartment. The door opened into a foyer which led into the living room. From the living room a hallway extended to the back bedroom. The police found defendant in the back bedroom asleep. Officer Patton woke defendant, who appeared startled. Patton showed him the search warrant and advised him of his constitutional rights. When Patton asked defendant if there were any narcotics in the apartment, defendant stated, "Follow me," and led Patton to an end table in the living room. The end table was in fact a safe, which held a "clear, white plastic bag containinig a white powdered substance." Patton asked defendant if there were any other narcotics in the apartment. Defendant responded, "No." Patton, however, continued the search, and in the course of it, found a blue suitcase which had within it a clear plastic bag containing "a white powdered substance," a clear plastic bag containing "green and white tablets," a clear plastic bag containing "some purple dots," a clear plastic bag containing "a quantity of white tablets," and three clear plastic bags containing "crushed green marijuana plant." Patton then closed the suitcase and, after placing Comay under arrest, took the suitcase directly to the Chicago police crime laboratory. Once there, Patton completed a narcotics envelope, detailing the contraband that had been confiscated. He inventoried the items and then turned the suspected narcotics over to the crime laboratory. He also testified to hand-carrying the inventoried package to court after signing it out of the Evidence and Recovered Property section at the police department.

Officer Patton identified People's Exhibit No. 1 as the type of large plastic bag which the crime laboratory uses to cover seized property once the technicians have completed the analysis. The large plastic bag had a cord tied around it. This cord was removed by Patton in court. Inside the plastic bag was a brown paper bag with a manila "narcotics" envelope attached. Patton identified it as the Chicago police department evidence envelope to which he had affixed his signature. Patton also identified the sealed brown paper bag bearing his initials as the one into which he had inserted the suspected narcotics. Patton then removed the items which were contained in the paper bag. He identified a plastic bag containing a chalky white substance as one of the items recovered from the suitcase. In reference to a bag of white tablets, Patton stated that although he had not seen the particular bag before (marked "Chicago Police Department, CR"), the tablets within, which had markings of "Worer 714" [sic], appeared similar to those that he had inventoried following the arrest. The envelopes holding the tablets were marked with the abbreviation of the chemistry section. Patton also stated that he had inventoried each of the seized items and placed them in plastic bags similar to those in which each item was now contained; he had then submitted the items for expert analysis to the crime laboratory.

On cross-examination, it was established that the white substance given to the policemen by Comay was not shown to be a narcotic by the crime laboratory's analysis. Patton also testified that the contraband was removed from the suitcase at the apartment and taken to the crime laboratory. He stated that he believed that the suitcase itself had remained at the apartment. He admitted that he had not tested for fingerprints on the suitcase and stated that he had found no identification in the suitcase.

The parties then stipulated that if Christine Provost, a chemist assigned to the Chicago police department, were present she would testify as follows: that she received a sealed package on March 23, 1979; that she opened and removed several plastic bags; that she analyzed the contents of two of these bags; and that the contents tested negatively for narcotic substances. The parties further stipulated that she would testify that tests on the other substances found in the plastic bags revealed that one contained 68.66 grams of cocaine (the bag marked "People's Exhibit No. 4" would be identified by Provost as the same plastic bag containing powder which Provost marked as Exhibit Q-2 and analyzed as cocaine); that one contained white tablets marked "Rorer 714" (she separated these tablets into two groups dependent upon whether the "4" in "Rorer 714" had an open or closed "4"; the ones with the open "4" were found to be Methaqualone; the ones with the closed "4" were discovered to be Diazepam); that three contained plant material weighing 524.3 grams, 578.7 grams, and 103 grams respectively (analysis proved the contents of the bags to be cannabis sativa); and that one contained purple tablets (she tested 23 of the 27 tablets; each contained lysergic acid diethylamide: LSD). During those periods when Provost was not actually involved in testing the substances, she would return the substances to the package in which they were originally inventoried and the package was placed in a locked area. As with the package that contained the cocaine, it was stipulated that Provost would testify that the bags marked People's Exhibits 5a, 5b, 5c, 7a, 7b, 7c, and 6b, were the same as those that she marked Q-4 (Diazepam), Q-3 (Methaqualone), Q-5 (cannabis, People's Exhibits 7a, 7b, 7c), and Q-6 (lysergic acid diethylamide), while in the process of testing the substances. Another stipulation, from Spiros

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Kane, the manager of the apartment building in which defendant was arrested, was offered to prove that defendant was the lessee of the apartment in which the narcotics were seized. It was also stipulated that defendant was shown as the customer of record for billings by Commonwealth Edison Company and the telephone company to the apartment in question.

Lynn Hostetler was the first witness called by the defendant. She testified that when she arrived at defendant's apartment the day before his arrest, his cleaning lady was still in the apartment. Hostetler stayed at defendant's apartment that night and left the next morning at about 7:45 a.m. She did not observe any suitcases in the foyer, or in any other room. Defendant's counsel then attempted to question the witness about the substance of phone calls which defendant had received in January 1979. Objection to testimony about the content of the telephone calls was made and sustained. The witness then testified that after the phone calls, police came to the apartment. Hostetler also testified that she had listened in on one of the phone calls and that the person on the phone identified herself as Cathy Bennet. The witness stated that Bennet was a "girl friend" of defendant and that, "They were having difficulties."

The second defense witness, Arlee Benns, testified next. She stated that she was defendant's housekeeper at the time of his arrest. Defendant had spent the day before his arrest in bed with a cold. Benns also testified that she had never observed marijuana in defendant's apartment *but had observed cocaine.* (Emphasis supplied). She stated that she had not noticed a blue suitcase in defendant's apartment at any time since she had been his housekeeper. The foregoing testimony was adduced during direct examination.

The final witness for the defense was defendant himself. He testified that he had been dating Cathy Bennet quite seriously until January of 1979. She had a key to his apartment and spent many nights there. On January 9, 1979, he received several hysterical phone calls from Bennet and the police came to his door later that night. They stated that they were there in relation to a drug complaint, and searched his apartment. After the search, the police left. About a week before his arrest, defendant had an argument with Bennet and broke off their relationship.

On the morning of his arrest, defendant had left his apartment at about 8:30 a.m. to get something to eat. As he left he did not notice any suitcases in the foyer of his apartment. He returned to the apartment within a half hour and went back to bed. The next thing he remembered was being awakened by men in plain clothes. They asked if he had any weapons or money. Defendant testified that the thought he was being robbed. Defendant denied that he had any narcotics in the apartment or that he had taken a bag of a white substance from the safe.

In rebuttal the State called George Caruso, a police officer for the city of Chicago. He confirmed officer Patton's testimony that after defendant was shown the search warrant, he voluntarily led the police officers into the living room to open the safe.

Defendant advanced his theory of the case during closing arguments. He contended that someone, most probably a former girl friend peeved by defendant's lack of attention, falsely informed the police that defendant was holding drugs and then placed the drugs (unbeknownst to defendant) in defendant's apartment either shortly before the police arrived or during the search. Following a

denial of defendant's post-trial motion, the trial court found defendant guilty of possession of more than 30 grams of cocaine (a Class I felony), not guilty of possession with intent to deliver cocaine, guilty of possession of more than 30 grams of lysergic acid diethylamide (a Class III felony), guilty of possession of more than 500 grams of marijuana (a Class III felony), and guilty of possession of less than 200 grams of methaqualone (a Class III felony). Before pronouncing sentence, the trial court noted that the statutes governing sentencing (*see* Ill. Rev. Stat. 1979, ch. 38, par. 1005-5-3; Ill. Rev. Stat. 1979, ch. 56½, par. 1402) did not allow probation or work release as sentencing alternatives. The court then sentenced defendant to the penitentiary for a period of 10 years. The colloquy between defendant and the trial court, both before and after sentencing, establishes that all parties were aware that the mandatory penitentiary sentence was imposed for the Class I felony—possession of more than 30 grams of cocaine.

Defendant first contends that the evidence was insufficient to prove beyond a reasonable doubt knowing constructive possession. Although defendant did not have personal possession of the narcotics, proof of constructive possession can sustain a conviction if evidence of defendant's acts, declaration or conduct is such that an inference of knowing possession may be drawn. (*See People* v. *Mack* (1957), 12 Ill. 2d 151, 159-60, 145 N.E.2d 609.) The inference is a question for resolution by the court sitting as trier of fact. (*Mack*, at 160.) In *Mack*, constructive possession is defined as the "keeping of narcotics in a place under the immediate and exclusive control of the accused." (*Mack*, at 162). Keeping in mind that both knowledge and constructive possession are fact questions properly entrusted to the trier of fact, there is sufficient

credible evidence in the case at bar to prove defendant's guilt. By all accounts, defendant was alone in the apartment for a period of time prior to the arrest. The evidence establishes that the apartment, and, inferentially, its contents, were under defendant's control. (*See People* v. *Nettles* (1961), 23 Ill. 2d 306, 308-09, 178 N.E.2d 361, *cert. denied* (1962), 369 U.S. 853.) The apartment door in the instant case was locked. The police testified that they observed suitcases in the foyer on their way into the apartment. The police also testified that defendant acknowledged that he had narcotics in the apartment by leading the investigators to a disguised safe and withdrawing two bags of "narcotic-like" substance from the safe. The trier of fact could properly infer that defendant's act was an attempt to forestall any further search for the actual narcotics. Although defendant testified that other parties had been given keys to his apartment, he admitted that he lived alone and with no regular companion. Furthermore, documentary proof was introduced to establish defendant's payment of electric and telephone bills, as well as his status a ssole lessee of the apartment. This evidence, viewed in its entirety, was sufficient, if accepted by the trier of fact as truthful, to sustain defendant's conviction. *See Mack*, at 163.

Defendant has cited many cases, none of which contradict the conclusion reached above. In *People* v. *Binns* (1975), 27 Ill. App.3d 978, 327 N.E.2d 369, the police found the rear door of the defendant's apartment open. The defendant, unlike in the instant case, was not alone in the apartment. (*See also People* v. *Connie* (1964), 52 Ill. App.2d 221, 228, 201 N.E.2d 641; *People* v. *Wolski* (1975), 27 Ill. App.3d 526, 327 N.E.2d 308; *People* v. *Faulkner* (1967), 83 Ill. App.2d 54, 226 N.E.2d 467.) Most importantly, a witness testified at the *Binns* trial

that he, and not the defendant, had placed the envelopes containing marijuana in defendant's apartment. (*See also People* v. *Ireland* (1976), 38 Ill. App.3d 616, 348 N.E. 2d 277.) In *People* v. *Ridley* (1978), 59 Ill. App.3d 164, 376 N.E.2d 43, in contrast to the instant case, there was testimony that the room in which the contraband was discovered was not the defendant's room.

Defendant also contends that the State's failure to produce the blue suitcase at trial somehow parallels cases in which a conviction was reversed for the State's failure to produce the actual illegal contraband at trial. (*See People* v. *Taylor* (1977), 54 Ill. App.3d 454, 369 I.E.2d 573.) Defendant in the instant case, however, was not charged with possession of a blue suitcase; rather, he was charged with possession of narcotics which, by all accounts, were produced at trial. Moreover, defendant has failed to present any cogent argument as to why the failure to produce the blue suitcase at trial should render the police testimony suspect. Rather, Officer Patton's confusion about what had actually become of the suitcase was a matter for the trier of fact, whose duty it was to assess the evidence and resolve any inconsistencies. *See People* v. *Yarbrough* (1977), 67 Ill. 2d 222, 227, 367 N.E.2d 666.

Defendant's second contention, that the chain of possession of the narcotics was not established, is equally without merit. As set out in detail above, Officer Patton testified in detail as to his control of the narcotics after their discovery, to his inventorying of the substances, and to his relinquishing control to the crime laboratory. The stipulated testimony of Provost established her control during testing, and her marking of the substances. Furthermore, defense counsel did not object to the foundation for admission of the narcotics at trial or raise the

issue in his post-trial motion and thus waived this point. *See People* v. *Lain* (1980), 80 Ill. App.3d 1136, 1137, 400 N.E.2d 1033; *People* v. *Coleman* (1980), 91 Ill. App.3d 646, ... N.E.2d .....

The evidence did not suggest the possibility of substitution, tampering or alteration, but rather established an unbroken chain of custody. (*See People* v. *Valentin* (1978), 66 Ill. App.3d 488, 492, 384 N.E.2d 67.) In contrast to the cases cited by defendant (*see People* v. *Scott* (1973), 22 Ill. App.3d 770, 317 N.E.2d 736; *People* v. *Resketo* (1972), 3 Ill. App.3d 633, 279 N.E.2d 432; *People* v. *Woessner* (1971), 132 Ill. App.2d 58, 268 N.E.2d 508), there is no question in the case at bar that the substances tested were actually drugs.

Defendant's third issue is that the trial court erred in denying admission of hearsay testimony. We note that defense counsel did not make an offer of proof at the time of objections or otherwise indicate why the proposed hearsay testimony was relevant or admissible or what its content would be. It would be mere speculation on this court's part to hold the "evidence" admissible or even probative of the issue presented without specific knowledge of what the "evidence" would be. Thus, *People* v. *Ireland* (1976), 38 Ill. App.3d 616, 348 N.E.2d 277, in which the substance of the proposed testimony was presented to the trial court and then suppressed, is not apposite to the case at bar.

Defendant's fourth contention is that the sentence imposed was illegal and excessive. He asserts that it was illegal because the court did not indicate for what charges the sentence was being imposed. The transcript clearly indicates, contrary to defendant's assertions, that the

trial court was sentencing defendant on the Class I felony charge, possession of cocaine. As defendant has raised the issue of the propriety of sentencing, this court may remand the case for sentencing on the three offenses, all Class III felonies, of which defendant was convicted but not sentenced. *See People* v. *Blakeney* (1978), 59 Ill. App.3d 119, 124-25, 375 N.E.2d 1309, *cert. denied* (1979), 440 U.S. 915.

Defendant also maintains that the sentence was excessive. The range of sentencing for a Class I felony is 4 to 15 years. (Ill. Rev. Stat. 1979, ch. 1005-8-1(a)(4); *see also* Ill. Rev. Stat. 1979, ch. 56½, par. 1402(a)(2).) A sentence of 10 years is well within the statutory provision and is not an abuse of the trial court's discretion. *See People* v. *Perruquet* (1977), 68 Ill. 2d 149, 368 N.E.2d 882.

For the foregoing reasons, the convictions are affirmed, and the case is remanded to the trial court for sentencing on Counts III, IV, and V (possession of LSD, methaqualone, and over 500 grams of marijuana).

Dated at Chicago, Illinois, this 17th day of March, 1981.

APPENDIX B

ILLINOIS SUPREME COURT
CLELL L. WOODS, CLERK
Supreme Court Building
Springfield, IL 62706
(217) 782-2035

October 19, 1981

Mr. Julius L. Echeles
Attorney at Law
35 E. Wacker Dr., S#3500
Chicago, IL 60601

No. 54960 — People State of Illinois, respondent, vs. Daniel Comay, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ Clell L. Woods
Clerk of the Supreme Court

Opposition

Office - Supreme Court, U.S.
FILED
JAN 18 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1130

In the Supreme Court of the United States

OCTOBER TERM, 1981

DANIEL COMAY,
Petitioner,

vs.

THE STATE OF ILLINOIS,
Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court of Illinois, First District

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Whether the petitioner was tried consistent with his right to due process of law where no question exists as to the applicability of *Jackson v. Virginia*, 443 U.S. 307, and *In Re Winship*, 397 U.S. 358, to bench trials and where the chain of custody of the contraband seized in the instant case was established both under the facts and the applicable law.

Whether the petitioner was tried consistent with his right to due process of law where the petitioner's possession of controlled substances was based on his exclusive right to use the premises where the contraband was found and where the evidence showed that no one besides the petitioner was on the premises when he was arrested and the narcotics seized.

Whether the petitioner had the right to present evidence of overheard telephone conversations where the trial court properly excluded the testimony in question on hearsay grounds, petitioner's trial counsel failed to make an offer of proof, and where the resolution of this issue merely involves questions of evidence applied under familiar legal rules.

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No. 80-1130

In the Supreme Court of the United States

OCTOBER TERM, 1981

DANIEL COMAY,
Petitioner

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court of Illinois, First District

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The unpublished order of the Appellate Court of Illinois, First District, affirming the petitioner's convictions of possession of more than 30 grams of cocaine, possession of more than 30 grams of lysergic acid diethylamide, possession of more than 500 grams of marijuana, and possession of less than 200 grams of methaqualone, is set out in full in the petition for writ of certiorari, Appendix "A".

JURISDICTION

The jurisdictional requisites have been set forth in the Petition for a Writ of Certiorari. However, as treated more fully within this brief, the respondent submits that the petitioner has not shown any good reason for this Court to exercise its sound judicial discretion to grant his petition.

STATEMENT OF THE CASE

After a bench trial in the Circuit Court of Cook County, Illinois, the petitioner, Daniel Comay, was convicted of four counts of possession of an unlawful substance. (R. 270)[1] He was sentenced to 10 years imprisonment in the Illinois Department of Corrections. (R. 314-315) The defendant appealed the judgments of conviction and the sentence to the Appellate Court of Illinois, First District. The Appellate Court affirmed the defendant's convictions and remanded for sentencing as to Counts 3, 4 and 5. (App. "A" at 11) The remand for sentencing, however, is not involved in the petition before this Court. The Supreme Court of Illinois also denied defendant's petition for leave to appeal. (App. "B" at 12)

THE PETITIONER'S TRIAL

Chicago police officer Paris Patton testified that on February 9, 1979, he was assigned to the Chicago Police Department's Vice Control Division, narcotics section. (R. 54) Pursuant to a search warrant, Patton, accompanied by other police officers, went to petitioner's residence at 11:30 a.m. that morning. (R. 55) Patton knocked at the door and, when there was no answer, waited approximately 1½ hours until a

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[1] R. designates the transcript of the record of the Petitioner's trial.

maintenance man appeared who let him in the apartment. (R. 57) The door opened into a foyer which led into the living room. From the living room a hallway extended to the back bedroom. (R. 57)

The officers found the petitioner asleep in the back bedroom. (R. 57) Officer Patton woke the petitioner by calling his name and showed him the search warrant. (R. 58) He then advised the petitioner of his constitutional rights. When Patton asked petitioner if there were any narcotics in the apartment, petitioner replied, "Follow me, " and led Patton to an end table in the living room. (R. 60) The end table was in fact a safe, which held a "clear, white plastic bag containing a white powdered substance." (R. 60) Patton then asked petitioner if there were any more narcotics in the apartment and petitioner responded, "No." (R. 60)

Officer Patton, however, continued to search, and in the course of the search found a blue suitcase in the foyer of petitioner's apartment, which had within it a clear plastic bag containing "a white powdered substance," a clear plastic bag containing "green and white tablets," a clear plastic bag containing "some purple dots," a clear plastic bag containing "a quantity of white tablets," and three clear plastic bags containing "crushed green marijuana plant." (R. 61)

After arresting the petitioner, Officer Patton went directly to police headquarters where he filled out a narcotics evidence envelope, listing the contraband he had confiscated. (R. 63) The officer then personally went to the Crime Laboratory where he inventoried the confiscated items and submitted them for analysis. (R. 63) Officer Patton also testified to hand-carrying the inventoried package to court after signing it out of the Evidence and Recovered Property Section at police headquarters. (R. 64)

Officer Patton identified People's Exhibit No. 1 as the type of large plastic bag which the Crime Laboratory used to cover

seized property once the technicians have completed their analysis. (R. 65) The large plastic bag had a cord tied around it which was removed by Patton in court. (R. 65-66) Inside the plastic bag was a brown paper bag with a manila narcotics envelope attached. Patton identified it as the Chicago Police Department evidence envelope to which he had affixed his signature on February 9, 1979. (R. 67-68) Patton also identified the sealed brown paper bag bearing his initials as the one into which he had inserted the items confiscated from defendant's apartment. (R. 68-69)

Officer Patton then identified the contents of People's Exhibits Nos. 4 through 9 as being similar to the substances he found in the petitioner's apartment on February 9, 1979. (R. 69-80) Patton also stated that he had inventoried each of the seized items and placed them in plastic bags similar to those in which each item was now contained and had submitted the items to the Crime Laboratory for expert analysis.

Following Officer Patton's testimony, evidence was received by way of stipulation between the People and the petitioner. It was stipulated that if Christine Provost were called she would testify that she is a Chicago Police Department Chemist. (R. 145) On March 23, 1979, she received a sealed package under inventory number 617705. On April 3, 1979, she opened the package and removed several plastic bags. One of the bags contained white powder, another contained green capsules. (R. 145) Provost analyzed the contents of both bags and concluded they were negative for selected controlled substances. (R. 145) Provost then examined another one of the plastic bags from the sealed package. She analyzed the contents of the bag and determined that the white powder, contained cocaine. (R. 146) Provost would testify this bag which she marked as Exhibit No. Q-2 in her testing was People's Exhibit No. 4. (R. 146) Provost then examined a plastic bag containing white tablets marked "Rorer ____4." She

labeled those tablets with an open "4" as No. Q-3 for testing and determined they contained methaqualone. (R. 147) She labeled those pills with a closed "4" as No. Q-4. These tablets contained Drazepan. (R. 147) She placed Q-3 in a plastic bag and this plastic bag was People's Exhibit No. 5-b. (R. 147) Those tablets labeled Q-4 were also put in a plastic bag and embody People's Exhibit No. 5a. (R. 147) Provost set these bags aside and examined three bags containing plant material. (R. 148) These bags contained marijuana. (R. 148) They are embodied by People's Exhibits Nos. 7a, b, and c. (R. 148) On April 3, 1979, all these materials were locked away until April 19, 1979. She then removed the package and took out one plastic bag containing purple tablets. Provost had marked this bag as Q-6 on April 3, 1979. There were 27 purple tablets inside. The tablets were analyzed and were found to contain 0.20 grams of lysergic acid diethylamide, or LSD. (R. 149) Provost would testify these LSD tablets are embodied in People's Exhibit No. 6. (R. 149) All of the plastic bags were then returned to the package under inventory number 617705. (R. 149)

Following this stipulation another stipulation, from the manager of the apartment building in which petitioner was arrested, was offered to prove that petitioner was the lessee of the apartment in which the narcotics were seized. (R. 151) It was further stipulated that petitioner was shown as the customer of record for billings by the electric and telephone companies to the apartment in question. (R. 152-154)

Lynn Hostetler was the first witness called by the petitioner. She testified that when she arrived at petitioner's apartment the day before his arrest, his cleaning lady was still in the apartment. Hostetler stayed at petitioner's apartment that night and left the next morning at about 7:45 a.m. She did not observe any suitcases in the foyer, or in any other room. Petitioner's counsel then attempted to question the witness

about the substance of telephone calls which petitioner had received in January of 1979. Objection to testimony about the content of the telephone calls was made and sustained. The witness then testified that after the telephone calls, police came to the apartment. Hostetler also testified that she had listened in on one of the telephone calls and that the person on the telephone identified herself as Cathy Bennet. The witness stated that Bennet was a "girl friend" of petitioner's and that, "They were having difficulties." (R. 172-182)

The second defense witness, Arlee Benns, testified next. She stated that she was petitioner's housekeeper at the time of his arrest. (R. 192) Petitioner had spent the day before his arrest in bed with a cold. (R. 196) Benns also testified that she had never observed marijuana in petitioner's apartment but had observed cocaine. (R. 200) She stated that she had not noticed a blue suitcase in petitioner's apartment at any time since she had been his housekeeper. (R. 201)

The final witness for the defense was petitioner himself. He testified that he had been dating Cathy Bennet quite seriously until January of 1979. (R. 214-216) She had a key to his apartment and spent many nights there. (R. 216) On January 9, 1979, he received several hysterical telephone calls from Bennet and the police came to his door later that night. They stated that they were there in relation to a drug complaint, and searched his apartment. (R. 216-217) After the search, the police left. About a week before his arrest, petitioner had an argument with Bennet and broke off their relationship. (R. 218) Petitioner tried to get his key back from Bennet, but she refused to return it. (R. 219)

On the morning of his arrest, petitioner left his apartment at about 8:50 a.m. to get something to eat. As he left he did not notice any suitcases in the foyer of his apartment. He returned to the apartment within a half hour and went back to bed. The next thing he remembered was being awakened

by men in plain clothes. They asked if he had any weapons or money. Petitioner testified that he thought he was being robbed. Petitioner denied that he had any narcotics in the apartment or that he had taken a bag containing a white substance from the safe. (R. 221-227)

In rebuttal the People called George Caruso, a police officer for the City of Chicago. He confirmed Officer Patton's testimony that after petitioner was shown the search warrant, he voluntarily led the police officers into the living room to open the safe. (R. 242-244)

The trial court found petitioner guilty on four counts of possession of controlled substances and sentenced him to 10 years imprisonment. (R. 270, 314-15) Petitioner appealed his convictions and sentence to the Appellate Court of Illinois.

THE PETITIONER'S APPEAL

In an unpublished order of the Court, pursuant to Illinois Supreme Court Rule 23, Ill. Rev. Stat. 1979, Ch. 110A, Sec. 23, the Appellate Court of Illinois, First District, affirmed the petitioner's convictions and remanded the cause to the trial court for sentencing purposes only. (The Order is set out in full in the petition for writ of certiorari, Appendix "A".) The Appellate Court ruled, *inter alia*, that the trial evidence was sufficient beyond a reasonable doubt to prove that petitioner had constructive possession of the narcotics in question. (Appendix "A" at 7-9) In so finding, the Appellate Court noted that knowledge and constructive possession are fact questions for the trier of fact and that the evidence established that the apartment, and, inferentially, its contents, were under the petitioner's control. (Appendix "A" at 7-8)

The Appellate Court also ruled that the evidence established an unbroken chain of custody of the narcotics and did

not suggest the possiblity or substitution, tampering, or alteration. (Appendix "A" at 9-10) The Appellate Court also noted that petitioner waived this issue for purposes of appeal by failing to object to the foundation for admission of the narcotics at trial or raise the issue in his post-trial motion.

Finally, the Appellate Court addressed the petitioner's contention on appeal that reversible error occurred when the trial court denied admission of hearsay testimony. The Appellate Court noted that defense counsel failed to make an offer of proof to show what the statements would reveal or to "otherwise indicate why the proposed hearsay testimony was relevant or admissible or what its content would be." Thus, the Appellate Court concluded that it would be "mere speculation" on its part to hold the hearsay testimony admissible or even probative of any issue before the court. (Appendix "A" at 10)

Following the affirmance of his convictions by the Appellate Court, the petitioner sought leave to appeal to the Supreme Court of Illinois. On October 19, 1981, the Supreme Court of Illinois denied his petition for leave to appeal. (Appendix "B")

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I.

THE PETITIONER HAS FAILED TO SHOW ANY NEED FOR THIS COURT TO GRANT HIS PETITION FOR A WRIT OF CERTIORARI WHERE THE DUE PROCESS REQUIREMENTS OF *JACKSON V. VIRGINIA*, 443 U.S. 307, CLEARLY APPLY TO ALL STATE CRIMINAL PROCEEDINGS, NOT MERELY JURY TRIALS, AND THE EVIDENCE ADDUCED AT TRIAL CLEARLY SHOWS THAT THE REQUIREMENTS WERE SATISFIED IN THIS CASE, AND WHERE THE RULE OF LAW PERTAINING TO CHAIN OF CUSTODY IS THE SAME BOTH IN ILLINOIS AND IN THE FEDERAL COURTS.

The petitioner contends that a Writ of Certiorari should be granted by this Court on the basis that his due process rights were infringed because no reasonable finder of fact could have found that the narcotics seized in petitioner's apartment were in fact the same substances tested by the police chemist and admitted into evidence against petitioner at trial. The respondent maintains that the petition for certiorari is improperly brought upon this basis because no substantial federal question has been raised by petitioner and because the issue here is clearly not sufficiently important to warrant this Court's attention. Moreover, the respondent maintains that the decision below gave full consideration to the issues and decided them correctly.

Petitioner claims that certiorari should be granted here so that this Court may clarify the applicability of the due process aspects of *Jackson v. Virginia*, 443 U.S. 307 (1979), to a state bench trial, and to address the evidentiary requirements con-

cerning the chain of custody of evidence. As to petitioner's first argument, it is clear that there is no need to give plenary consideration to the applicability of *Jackson v. Virginia, supra*, to the instant case. In *Jackson* this Court applied the due process standard of proof beyond a reasonable doubt in criminal prosecutions to a federal *habeas corpus* proceeding involving a conviction in a state court. In applying this standard this Court stated that:

> *** the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime beyond a reasonable doubt. [Emphasis supplied]

Therefore, defendant's contention that this Court should grant certiorari in order to apply the *Jackson* due process standard to a state bench trial is without merit because it is implicit in both *Jackson* and *In re Winship*, 397 U.S. 358 (1970), that the aforementioned standard applies to "any rational trier of fact," including the trial judge in bench trials.

That the *Jackson* standard was correctly applied in the case at bar is clear from the trial record. As the Appellate Court found, Officer Patton testified in detail concerning his control of the narcotics after their discovery, to his inventorying of the substances, and to his relinquishing control to the crime laboratory. (R. 63-64) Moreover, the stipulated testimony of the police chemist who determined that the substances found in petitioner's apartment were indeed narcotics established her control during the process. (R. 145-149) Finally, Officer Patton identified the brown bag into which he had inserted the package containing the narcotics on the date of their seizure and he further identified the evidence envelope which displayed his signature and which he had attached to the large paper bag. (R. 66-68) Officer Patton also identified every individual package of narcotics which was contained in

the larger evidence bag as being similar to the packages he found in defendant's apartment on February 9, 1979. (R. 69-78) Therefore, the Appellate Court's finding that the "evidence did not suggest the possibility of substitution, tampering, or alteration, but rather established an unbroken chain of custody" clearly comported with the due process requirements of *Jackson* and *Winship, supra.*

Only a brief word will be said about petitioner's contention that this Court should grant certiorari in order to address the evidentiary requirements concerning the chain of custody of evidence. Let it suffice to say that the law of chain of custody both in Illinois and in the federal courts is the same. As the Eighth Circuit Court of Appeals stated in *United States v. Brown*, 482 F.2d 1226, 1228 (8th Cir. 1973):

> The criteria governing admission of exhibits into evidence is that there must be a showing that the physical exhibit being offered is in substantially the same condition as when the crime was committed. That determination is to be made by the trial judge, not the jury, and may not be overturned except for a clear abuse of discretion.

Accord: *Brewer v. United States*, 353 F.2d 260, 263 (8th Cir. 1965); *United States v. Aviles*, 623 F.2d 1192 (7th Cir. 1980); *People v. Grayson*, 89 Ill. App. 3d 766, 411 N.E.2d 1177 (1st Dist. 1980); *People v. Valentin*, 66 Ill. App. 3d 488, 384 N.E.2d 67 (1st Dist. 1978). Based on the evidence adduced at trial, there can be no doubt that the Appellate Court properly applied the chain of custody rule in the instant case.

For all the reasons noted above, the respondent urges that this issue was properly decided by the Illinois Appellate Court, and because the petitioner has failed to show any need for this Court to grant his petition for certiorari, his petition should be denied.

II.

THE PETITIONER HAS FAILED TO SHOW ANY NEED FOR THIS COURT TO GRANT HIS PETITION FOR A WRIT OF CERTIORARI WHERE THE PRESUMPTION RAISED BY THE POSSESSION OF CONTRABAND, WHETHER ACTUAL OR CONSTRUCTIVE, CLEARLY CONFORMS TO DUE PROCESS REQUIREMENTS, AND WHERE THE EVIDENCE ADDUCED AT TRIAL CLEARLY SUPPORTED THE TRIAL COURT'S FINDING OF POSSESSION OF CONTRABAND BY PETITIONER.

The petitioner next requests that a Writ of Certiorari be granted so that this Court may determine the constitutionality of the inference drawn by the trial court concerning constructive possession of contraband found in petitioner's apartment. In answer, the respondent maintains that petitioner's argument is nothing more than a disguised attempt to relitigate the issue of petitioner's guilt which was properly determined by the trial court and affirmed by the Illinois Appellate Court. Clearly, a Writ of Certiorari is improperly sought on this basis. Moreover, a review of the pertinent case law indicates that the presumption or inference applied by the trial court here was proper in all respects.

In essence, the petitioner is asking this Court to review the lengthy trial record to see if this Court can find what the trial court and the Appellate Court could not — a reasonable doubt as to the petitioner's guilt. This Court has repeatedly held, "We do not grant a certiorari to review evidence and discuss specific facts. *United States v. Johnston*, 268 U.S. 220, 227 (1925). "There are no exceptional circumstances of any kind that would justify" this Court in rejecting the findings of the Illinois Appellate Court, for those findings are clearly supported by the overwhelming weight of the evidence. *Fry Roof-*

ing v. Wood, 344 U.S. 157, 167 (1952). Although the petitioner has failed to show the need for this Court to, in its sound discretion, grant his petition, the respondent, confident that the Illinois Appellate Court has properly determined this issue, will briefly address the merits.

It should first be pointed out that both Illinois and federal decisional law relating to constructive possession of contraband are the same. Possession of narcotics can be constructive as well as actual. The hallmark of constructive possession is some measure of dominion or control over the contraband and this dominion and control can be either exclusive or shared. *United States v. Maspero*, 496 F.2d 1354, 1359 (5th Cir. 1974); *United States v. Staten*, 581 F.2d 878 (D.C. Cir. 1978); *People v. Davis*, 33 Ill. 2d 134, 210 N.E.2d 530 (1965). Furthermore, circumstantial evidence is sufficient to support an inference of constructive possession. *United States v. Ramirez-Valdez*, 468 F.2d 235 (9th Cir. 1972); *Covearubias v. United States*, 272 F.2d 352 (9th Cir. 1960); *People v. Nettles*, 23 Ill. 2d 306, 178 N.E.2d 361 (1961), *cert. denied*, 369 U.S. 853 (1962). Finally, it has been held by this Court that a presumption similar to the one applied in the case at bar does not shift the burden of proof to the defendant; rather it merely places on defendant, at a certain point, the burden of going forward with the evidence. *Roviaro v. United States*, 353 U.S. 53 (1957). Such a presumption is merely rebuttable, not conclusive. *Napue v. United States*, 432 F.2d 1230 (7th Cir. 1970).

In the instant case, there was clearly sufficient evidence to prove beyond a reasonable doubt that petitioner had constructive possession of the narcotics in question. There is no question that the illicit drugs were found by police in petitioner's own apartment. (R. 60-61, 151-154) No showing was made that anyone but petitioner was in his apartment on the morning that he was arrested and the narcotics seized. Peti-

tioner's testimony that he went out earlier on the morning in question and did not see the suitcases containing the narcotics in his foyer (R. 222) clearly created a question for the trier of fact to resolve. The trial court simply did not believe that between the time petitioner returned home and the time the police arrived, someone entered his apartment, left the narcotics and departed. Finally, the mere possibility that other persons, according to petitioner's unsupported claims, might have had access to petitioner's apartment, is irrelevant since no evidence was introduced at trial to show that these alleged persons were in fact in petitioner's apartment on the morning in question.

For all the reasons noted above, the respondent urges that because this issue was properly decided by the Illinois Appellate Court, because the decision of the Appellate Court is in accord with the decisions of this Court and the federal courts of appeals, and because the petitioner has failed to show any need for this Court to grant his petition for a Writ of Certiorari and entertain a *de novo* review of the facts in this case, his petition should be denied.

III.

THE PETITIONER HAS FAILED TO SHOW ANY NEED FOR THIS COURT TO GRANT HIS PETITION FOR A WRIT OF CERTIORARI WHERE THE TRIAL COURT PROPERLY EXCLUDED THE TESTIMONY IN QUESTION ON HEARSAY GROUNDS, WHERE PETITIONER FAILED TO PRESERVE THIS ISSUE BY MAKING AN OFFER OF PROOF, AND WHERE A REVIEW BY THIS COURT WOULD ONLY INVOLVE QUESTIONS OF EVIDENCE APPLIED UNDER FAMILIAR LEGAL RULES.

The final ground upon which petitioner seeks the granting of a Writ of Certiorari by this Court concerns the exclusion of evidence where no offer of proof is made to show what the excluded evidence would entail. Petitioner contends that the exclusion of the testimony in the case at bar violated his due process right to present relevant defense evidence. The respondent maintains, however, that this issue was correctly decided in the decision below and that a review by this Court would involve only questions of evidence applied under familiar legal rules. Therefore, the petition should be denied.

It should first be pointed out that the excluded testimony in question was clearly hearsay. Therefore, the prosecutor's objection was properly granted. Both the petitioner and his girlfriend at the time of his arrest, Lynn Hostetler, attempted to testify as to the substance of alleged conversations between petitioner and his former girlfriend. The record shows that the trial judge allowed Ms. Hostetler to testify that the petitioner received a telephone call and that the caller was his former girlfriend. However, the judge correctly sustained the prosecutor's hearsay objections when the witness attempted to testify as to the alleged statements by petitioner's former girlfriend. (R. 179-182) During petitioner's testimony the trial

judge also properly sustained the prosecutor's hearsay objection to other alleged statements made to petitioner by his former girlfriend. (R. 217-218) Moreover, as the Appellate Court noted (Appendix "A" at 10), counsel for petitioner failed to make an offer of proof or to otherwise indicate why the proposed hearsay testimony was relevant or admissible or what its content would be.

Based on the foregoing facts it is clear that the trial judge properly barred the proposed testimony on hearsay grounds. The out of court statements were clearly being introduced to show the truth of the matters asserted therein. Since the statements were obviously self-serving and since the declarant was not in court, there was no way the trial judge could have determined the credibility of those statements or even ascertained if the statements were in fact made. Hence, the trial judge properly excluded this incompetent testimony under well settled evidentiary principles. *Hopt v. People of the Territory of Utah*, 110 U.S. 574 (1884); *People v. Carpenter*, 28 Ill. 2d 116, 190 N.E.2d 738 (1963); Federal Rule of Evidence 801(c); *McCormick on Evidence*, secs. 245 and 246 (2nd Edition 1972).

Additionally, the failure of petitioner's trial counsel to make an offer of proof to show what the proposed testimony would have entailed resulted in the Appellate Court's finding that this issue was not preserved for review. (Appendix "A" at 10) This ruling was clearly proper under both Illinois and federal evidence law. *United States v. Panza*, 612 F.2d 432 (9th Cir. 1979), *cert. denied*, 447 U.S. 925 (1980); *People v. Mireles*, 79 Ill. App. 3d 173, 398 N.E.2d 150 (1st Dist. 1979); Federal Rule of Evidence 103(a)(2); *McCormick On Evidence*, sec. 51 (2nd edition 1972).

Therefore, for all the reasons stated above, the respondent urges that because this issue was properly decided by the Illinois Appellate Court and because a review of this issue by

this Court would involve only questions of evidence applied under familiar legal rules, the petitioner has failed to show any need for this Court to grant his petition for certiorari and such petition should be denied.

CONCLUSION

The People of the State of Illinois respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,
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